IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

NOTICE OF MOTION NO. 3044 OF 2005

IN

SUIT NO. 3526 OF 1999

M/s. G..E. Countrywide consumer
Financial Services Ltd .....Plffs.
vs.
K.C. Sheth (H.U.F.) & Ors. .....Defnds.

Burzin Somanday i/b. Vinod Juwale for the plaintiffs.

CORAM: S.U. KAMDAR, J.

DATE : 14th October, 2005.

P.C. :.

1. The present suit is filed for the recovery of sum of Rs.1,29,64,666/- alongwith interest at the rate of 24% pa. Prayer (b) is for foreclosure of the mortgage on the ground that Flat no. 15 situated in the building known as ‘Sun Flower’ at Cuffe Parade in the Cuffe Parade Ravi Kiran

Co-operative Hsg. Soc Ltd, Cuffe Parade, Mumbai-400 005 is mortgaged to the plaintiff by the defendant alongwith five shares bearing distinctive Nos.11 to 15 in the said society and right, title and interest thereunder. Under prayer (c) a declaration is sought that the said property together with the said shares are duly, legally and validly mortgaged in favour of the plaintiff herein.

2. In the aforesaid suit a notice of Motion was taken out and it is the case of the plaintiff that in a motion a consent order was arrived at. In the consent order which has been signed by the parties it has been inter-alia provided that the defendant has agreed to transfer, sell and assigned the suit flat to the plaintiff and he will transfer the said shares in favour of the plaintiff herein. An MOU was also executed as a part of the consent terms which is Ex.B to the present motion. It is the case of the plaintiff that inspite of the said consent order and MOU executed by the defendant the defendant has not complied terms thereof and has

not completed transfer of the suit flat in favour of the plaintiff herein. Thus the present Notice of Motion has been taken out for directions to the defendant to specifically peform the terms and conditions of the said MOU alongwith consent terms. By prayer (b) and (c) Receiver and injunction is sought inrespect of the said flat.

3. In my opinion by prayer (a) of the notice of Motion what is sought is specific performance of the said agreement arrived at and forming part of the consent order particularly MOU at Ex.B to the affidavit-in-support of the present notice of Motion. In the light of the prayers as it stands in the suit which are only for money decree and for foreclosure and sale of mortgage flat such a relief for specific performance in the Notice of Motion cannot be granted. The suit is not for specific performance. The suit is for enforcement of mortgage and recovery of money claim. Merely because a consent order is obtained between the parties providing for the sale of the flat cannot give any right to the plaintiff to take out present

motion for enforcement of terms and conditions for agreement for sale wihout filing of any suit for specific performance. A person is not entitled to seek performance by way of Notice of Motion. The motion is thoroughly misconceived and not maintainable. In the aforesaid circumstances, Motion dismissed. Plaintiff to pay cost quantified at Rs.10,000/-.

sd/-

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